Supreme Court, U.S.

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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

VERNON MILLS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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VERNON MILLS, PRO SE
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35 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Did the District Court have the right to overrule the Rules of Civil Procedures?

(2) Did the District Court have the right to issue Summary Judgment on the follow-up treatment of the injury in question when this was a part of the Complaint filed?

(3) Did the District Court have the right to dismiss my case on Summary Judgment without giving me my right to a trial?

(4) Does the District Court have the right to not acknowledge Supreme Court Rules?

(5) Does the District Court have the right to deprive a pro se litigant appointment of attorney to represent him?

(6) Does the District Court have the right to dismiss the doctor's own admission stating that an injury could have happened while under anesthesia, a copy of which was filed with the Complaint?

(7) Does the District Court have the right to dismiss my family doctor as an expert?

(8) Does the District Court have the right to dismiss facts of negligence which was filed with the Complaint?

(9) Does the District Court have the right to dismiss the deposition of the Defendant's expert without a trial?

(10) Does the District Court have the right to dismiss a case on Summary Judgment when the affidavit of defendant says one thing and then at a later date at his deposition, his answers is

different and inconsistent with medical facts and documents?

(11) Does the District Court have the right to dismiss Plaintiff's medical follow up treatment records from the Veteran's Administration Hospital in Lexington, Kentucky and allow the Defendant's expert witness to utilize parts of those records to establish that I was properly treated and had proper follow up medical treatment?

(12) Does the District Court have the right to dismiss a case when their own expert witness testifies in deposition that the medical records establishes that the doctor did state that the injury could have happened while under anesthesia?

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PETITION FOR WRIT OF CERTIORARI

Vernon Mills, a pro se litigant, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 23, 1997, to resolve important and serious issues concerning medical malpractice and the rights of veterans.

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is an unreported decision. It is reprinted in the Appendix hereto. (See beginning at App. 1)

By Order filed January 8, 1998, the Sixth Circuit denied the Petition for Rehearing. (See App. 4)

The decision of the United States District Court in the Eastern District of Kentucky is an unreported decision. It is reprinted in the Appendix beginning at App.5.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on October 23, 1997. The Court of Appeals denied the Petition for Rehearing on January 8, 1998. This court has jurisdiction to issue the requested writ of certiorari pursuant to 28 U.S.C. Sec. 1254(1) because the Petitioner seeks review of an adverse decision rendered by the United States Court of Appeals for the Sixth Circuit. Pursuant to the Supreme Court Rule 13.1, this Petition has been filed within ninety (90) days of the denial of the rehearing and is, therefore, timely filed.

STATEMENT OF CASE

A. FACTUAL BACKGROUND

This case arises from a claim against the United States of America due to an improperly performed stellate ganglion block which occurred at Richard L. Roudebush Veteran's Affairs Medical Center in Indianapolis, Indiana on July 3, 1991, causing injury to the Plaintiff as well as the Veterans' Administration denying Plaintiff proper follow up treatment for this injury in Lexington, Kentucky after Plaintiff's move to this area. This claim was denied at the Administrative level on November 12, 1993. Plaintiff filed for a reconsideration and James P. Kane, Assistant General Counsel, denied the filing of reconsideration saying the six (6) month filing period had expired when in fact it had not. Letter dated May 25, 1994 from James P. Kane states:

> "On May 13, 1994, we received your written request dated May 9, 1994 to review your Administrative Tort Claim which was previously denied by the Indianapolis District Counsel on November 12, 1993".

I have certified mail receipt dated May 9, 1994 which was well within the filing date requirement of six (6) months, yet he denied me the right to a reconsideration. This forced Plaintiff to file this claim in United States District Court. A complaint was filed in United States District Court, Eastern District of Kentucky - London, on October 17, 1994, Civil Action No. 94-389. Partial Summary Judgment in favor of the Defendant was granted on March 4, 1996 as to the Plaintiff's claim for denial of proper follow up treatment from his injury. This states that at the Rule 26 meeting was the first time that the Plaintiff included his improper follow up treatment, which in fact is stated on the original complaint that Plaintiff filed with the United States District Court. The Veteran's Administration waited

thirty-four (34) months to perform an MRI on Plaintiff to determine any damages. This MRI performed on May 3, 1994 showed a small central herniated nucleous pulposis at C-2-3 and bulging disc at the level of C-04-5. A copy of the MRI was also attached to the original complaint.

On December 9, 1996, Summary Judgment was granted in favor of Defendants which states that Plaintiff had no expert witness. Plaintiff had submitted a witness list including himself, his treating physician and Defendant's expert witness as a hostile witness at trial. Plaintiff filed a Notice of Appeal on January 8, 1997 with the United States District Court, Eastern District of Kentucky at London with a copy of his treating physician's report along with copies of stellate ganglion from medical dictionary, with notice of video deposition of Dr. Michael Carroll and Dr. John B. Ward dated December 2 and December 3, 1996. Also supplied a copy of the United States Supreme Court Decision in Brown v. Gardner, 115 S. Ct. 552 (1994), and also a copy of United States Court of Veterans' Appeals No. 90-120, Fred P. Gardner v. Edward J. Derwinski, filed November 25, 1991. Appeal filed in the United States Court of Appeals for the Sixth Circuit was denied Plaintiff on October 23, 1997. Plaintiff then filed for a rehearing which was denied January 8, 1998. On April 8, 1996, Plaintiff requested from the United States Attorney a copy of a signed consent form with the risks and side effects of procedure listed prior to performing the stellate ganglion block required by Rule 26 (a)(1) and also any other reports pertaining to the Plaintiff's co: tion which had not been provided to the Plaintiff. The Plaintiff never received this. Also, Defendant's expert witness even stated in his deposition that an MRI is one of the procedures performed to determine injury, but he did not state that proper treatment would be to perform the MRI thirty-four (34) months after the injury to determine damages.

REASONS FOR GRANTING THE PETITION

Summary Judgment was improper in Plaintiff's case according to the following rules:

1. Under Rule 56, n 512 -- United States is not entitled to Summary Judgment in its favor in medical malpractice action brought under Federal Tort Claims Act (28 USCS Section 1346(b)) on grounds of release from liability since genuine issue of material fact exist whether the parties intended to allow language of release, which only specifically named private hospital and not public health service hospital which was also involved, to also release United States from liability. Collins v. United States (1983, CA10 NM) 708 F2d 499. Although plaintiffs have no expert medical witness competent to testify as to standard of care exercised by neurologists and neurosurgeons, summary judgment in favor of defendant may be deemed improper, where plaintiffs may be able to establish requisite elements of their cause of action by examination of defendant's experts as adverse witnesses and by introducing into evidence deposition testimony of those experts. Lutz v. Estate of Hillier (1983, SD W Va) 574 F Supp. 1032.

2. Under Rule 56, n 140. --Movant's burden: Party seeking summary judgment always bears initial responsibility of informing District Court of basis for its motions, and identifying those portions of pleading, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, which it believes will demonstrate absence of any genuine issue of material fact. Celotex Corp. v. Catrett (1986, US) 91 L Ed 2d 265, 106 S Ct 2548.

3. Under Rule 56, n 93 -- Summary Judgment proceeding is

not substitute for trial and court cannot try factual issues on factual issues on motion for summary judgment since once such issue is found court's function as to summary judgment ends. Clayton v. James B. Clow & Sons (1957, DC Ill) 154 F Supp 108.

3. Under Rule 56, n 96 -- Although Rule 78 provides that District Court may make provision by local rule for submission and determination of motions without oral hearing, as matter of good practice report should not be had to this provision on motion for summary judgment unless it is made clear beyond all doubt that parties must present their affidavits and counter-affidavits in addition to whatever facts appear in pleadings, depositions, answers to interrogatories, and admissions on file; only then will it be proper to determine whether genuine issue of fact exists which requires trial, and in usual case it is more appropriate to set motion for summary judgment down for hearing as Rule 56(c) provides. Season-All Industries, Inc. v. Turkey Sise Ve Cam Fabrikalari, A.S. (1970, CA3 Pa) 425 F2d 34, 14 FR Serv 2d 153.

4. Under Rule 56, n 62 -- Rule 56, does not require that Plaintiff prove each element of his case or suffer summary judgment against him; rather defendant, in order to have summary judgment entered in his favor, must prove that he is so entitled on basis of undisputed facts. Thomas v. Petro-Wash, Inc. (1977, MD NC) 429 F Supp 808, 1977-1 CCH Trade Cases 61433.

5. Constitutional Law D.C.N.Y. 1982. -- Effective access to courts is a constitutional right which encompasses all means a defendant or petitioner might require to get fair hearing from judiciary on all charges brought against him or grievances alleged by him. Hillaiard v. Scully, 537 F. Supp. 1084.

6. Under 28 USCS Section 1346, n 133 -- Allegation of prisoner's complaint, failing to mention term "negligence", but alleging decedent was "left to die for over half hour without medical attention" raises issues of negligence as basis for relief, if facts fail to show intentional wrongdoing, such allegations are sufficient to establish jurisdiction for court to entertain Federal Tort Claims Act suit based on torturous act committed by the government employee "while acting within scope of his office or employment". Hoston v. Silbert (1982) 220 App DC 361, 681 F2d 876, on remand (DC Dist Col) 566 F Supp 1125.

CONCLUSION

For the foregoing reasons, the medical facts, and statutes of laws of this case, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Vernon Mills

VERNON MILLS

Date: 5 27-98

App. 1 (A)

No. 97-5056

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VERNON MILLS,	)	Filed October 23,
	)	1997
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

Before: MERRITT, MOORE, and BRIGHT, * Circuit Judges.

Vernon Mills, a Kentucky resident, appeals pro se a district court judgment in favor of the defendant on a complaint he filed pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. Section 2671 et seq. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Mills alleged in this complaint that he had been a victim of

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*The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

medical malpractice during the performance of a stellate ganglion block on July 3, 1991, at the Indianapolis, Indiana Veterans Administration Medical Center. He also argued that he received inadequate follow-up care for the pain he allegedly suffers as a result of that treatment at Veterans Administration Medical Centers in Kentucky and Tennessee, and inadequate treatment for his pulmonary problems and post-traumatic stress disorder. The district court granted summary judgment to the defendant after concluding that Mills had exhausted his administrative remedies only as to the claim regarding his treatment on July 3, 1991, and had not presented expert witness testimony essential to his claim of malpractice. On appeal, Mills reasserts his claims and also argues that he was denied due process during the administrative claim procedure when his motion for reconsideration of the denial of his claim was denied as untimely.

Upon review, we conclude that the arguments raised on appeal are meritless. The filing of an administrative claim is a jurisdictional prerequisite to the filing of a complaint under the FTCA. *Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1981) (per curiam). The administrative claim filed by Mills related only to the performance of the stellate ganglion block, therefore, that was the only claim properly before the district court. As to this claim, summary judgment was proper due to the complete failure of proof concerning the essential elements of a malpractice case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Expert witness testimony is necessary to establish that a physician violated the standard of reasonable care in a malpractice action. *See Simms v. Schweikher*, 651 N.E.2d 348, 350 (Ind. Ct. App. 1995). The district court explained this requirement to Mills and gave him another opportunity to identify an expert witness, but he failed to do so. Thus, there was no evidence presented to establish that the treatment Mills received was inappropriate.

The argument that Mills was denied due process during the administrative proceedings is irrelevant, as he has not shown that reconsideration would have altered the outcome of those proceedings, and he was not prevented from filing his complaint in the district court.

Accordingly, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Edward Green
Clerk

App. 4 (B)

No. 97-5056

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VERNON MILLS,	)	Filed January 8, 1998
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

Plaintiff-appellant Vernon Mills has filed a petition for rehearing of this court's order of October 23, 1997, affirming the district court's summary judgment for the defendant in this action under the Federal Tort Claims Act.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P. 40(a).

The petition for rehearing is therefore denied.

ENTERED BY ORDER OF THE COURT

/s/ Edward Green
Clerk

App. 5 (C)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 94-389

VERNON MILLS, PLAINTIFF,

ORDER

V.

UNITED STATES OF AMERICA, DEFENDANT.

* * * * * * * * * * *

This matter is before the Court upon the defendant's second motion to dismiss, or, in the alternative, motion for summary judgment (Record No. 31). The Court, after considering the defendant's supporting memorandum and the plaintiff's response, and after considering relevant portions of the record, will grant the defendant's motion.

The plaintiff, Vernon Mills ("Mills"), sued the defendant, United States of America ("U.S."), under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. Sections 1346(b) and 2674, with medical malpractice as the basis of the action. The facts of this case were set out in the order of this Court dated March 4, 1996. That order granted the defendant's motion to dismiss the plaintiff's claims against Veteran's Affairs facilities and personnel in Kentucky and Tennessee. The order denied the motion to dismiss with regard to the plaintiff's claims that arose from events at the Veterans Affairs Medical Center in Indianapolis, Indiana. In that same order, in light of the plaintiff's *pro se* status, the Court also granted the plaintiff

additional time to secure expert testimony that would be properly admissible in court. At that time the Court warned that, if the testimony so obtained would not support the plaintiff's claim, the claim would be dismissed.

Under the FTCA, the liability of the United States is controlled by the substantive law of the state where the incident of alleged negligent conduct occurred. *Rayonier, Inc. v United States*, 352 U.S. 315 (1957). Because the plaintiff's sole surviving claim is based on conduct in Indiana, the laws concerning medical malpractice in that state control.

Although expert testimony is generally required to establish the standard of care owed by the medical provider to a patient, expert testimony is not necessary if the issue of care is one within the appropriate realm of experience of lay persons. *Kerr v. Carlos*, 582 N.E.2d 860, 863 (Ind. Ct. App. 1991), *overruled on different grounds by Kennedy v. Murphy*, 659 N.E.2d 506, 508 (Ind. 1995). The few instances in which expert testimony is not essential to establish the standard of care involve events where, even without specialized training or experience, lay persons could perceive negligence (e.g., failing to remove a surgical instrument from a patient). *Simms v. Schweikher*, 651 N.E.2d 348, 350 (Ind. Ct. App. 1995).

In *Simms*, the plaintiff was badly burned when, during surgery performed by Schweikher, a technician placed a hot surgical instrument on the plaintiff's leg. The plaintiff sued the surgeon on the basis of vicarious liability. When Schweikher moved for summary judgment, the plaintiff did not offer her own expert testimony regarding the standard of care and Schweikher's negligence but, instead, relied on Schweikher's deposition, affidavit, and responses to interrogatories. The court held that the standards for surgeons and

hospital staff assisting with surgery are not within the realm of knowledge of lay persons. *Simms*, 651 N.E.2d at 350. The court affirmed summary judgment for the defendant because, by not presenting expert testimony that the defendant had not met the standard of care, the plaintiff had not raised a genuine issue of material fact. *Id.*

The plaintiff's claims in the instant case involve the stellate ganglion block performed on him on July 3, 1991, by Dr. Mike Carroll, the alleged inadequacy of informed consent, and other issues related to the follow-up from that procedure. The Court holds that these topics are outside the experience of lay persons so that expert medical testimony is necessary for the plaintiff to carry his burden at trial.

The plaintiff has listed himself as an expert witness (Amended Expert Witness List and Memorandum of Laws and Medical Facts, Record No. 29), justifying his designation as expert in that he experienced the events that are the bases of his suit. However, because the plaintiff does not possess the specialized training or experience in the area of medical procedures so that his testimony would assist the trier of fact to determine the standard of care in this medical malpractice case, he could not qualify as an expert witness. Fed. R. Evid. 702. In contrast, the defendant offers by affidavit the opinion by John B. Ward, M.D., a board certified anesthesiologist, who states that the plaintiff received treatment within the highest standards of care.

This Court previously directed the plaintiff to secure admissible expert testimony or risk having his claim dismissed. In failing to do so, the plaintiff cannot meet the burden described by *Simms*. Because the plaintiff has not proved the existence of a genuine issue of material fact, his claim must now be dismissed. *Celotex Corp. v. Cattrett*, 477 U.S. 317 (1986).

Accordingly, **IT IS ORDERED** that the defendant's motion to dismiss, or, in the alternative, motion for summary judgment, is **GRANTED.**

IT IS FURTHER ORDERED that this case is **DISMISSED WITH PREJUDICE** and is to be **STRICKEN** from the active docket.

This the 9th day of December, 1996.

/s/ Jennifer B. Coffman
Jennifer B. Coffman, Judge
United States District Court
Eastern District of Kentucky

App. 9 (C)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 94-389

VERNON MILLS, **PLAINTIFF,**

V.

JUDGMENT

UNITED STATES OF AMERICA, **DEFENDANT.**

* * * * * * * * * * *

The Court having granted the defendant's motion for summary judgment in an Order of even date, judgment is entered in favor of the defendant, with costs assessed against the plaintiff. There being no just cause for delay, this is a **FINAL** and **APPEALABLE** order.

This the 9th day of December, 1996.

/s/ Jennifer B. Coffman
Jennifer B. Coffman, Judge
United States District Court
Eastern District of Kentucky

App. 10 (D)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 94-389

VERNON MILLS PLAINTIFF

V. **ORDER**

UNITED STATES OF AMERICA DEFENDANT

* * * * * * * * * * *

This matter is before the Court upon the motion of the defendant, United States of America ("U.S."), to dismiss or, in the alternative, for summary judgment on plaintiff's *pro se* complaint [Record No. 11]. Fully briefed, this matter is ripe for decision.

FACTUAL BACKGROUND[1]

After the denial of his administrative claim, the plaintiff, Vernon Mills ("Mills"), filed a *pro se* complaint against the U.S. pursuant to the Federal Trot Claims Act, 28 U.S.C. Section 1346(b) and Section 2674 ("FTCA"). Mills' FTCA claim alleges that Dr.

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[1]The factual background presented is taken, in large part, from the U.S.'s memorandum in support of its motion for summary judgment. The Court is cognizant of its duty, in the summary judgment context, to accept the facts as stated by the party opposing the motion for summary judgment. However, Mills, the party opposing the motion, is a *pro se* litigant who has not presented the Court with a comprehensive factual background.

Mike Carroll ("Carroll"), a doctor at the Richard L. Roudebush Veterans Affairs ("VA") Medical Center in Indianapolis, Indiana negligently performed a stellate ganglion block on Mills on July 3, 1991. In his administrative claim which is the basis of his complaint, Mills alleges that Carroll improperly and incorrectly injected medication into his neck. Further, Mills alleges that Carroll did not properly inform him of the risks and complications involved in the medical procedure.

On December 12, 1994, the U.S. filed its answer to Mills' complaint. Pursuant to Fed. R. Civ. P. 26, the parties conducted a discovery planning meeting and filed their joint status report with the Court. At this Rule 26 meeting Mills, for the first time, insisted that his malpractice suit be expanded to include several additional claims. First, he asserted that his medical follow-up care was negligently provided by VA employees and agents at VA Medical Centers located in Lexington, Kentucky and Johnson City, Tennessee. Second, he insisted that he received negligent medical care and treatment for his pulmonary problems and post-traumatic stress disorder.

The Court entered a scheduling order setting forth the parties' discovery and planning deadlines. Mills was ordered to disclose the identity of his expert witnesses by March 21, 1995. Prior to this deadline, Mills filed a pleading styled "Expert Witness List" in which he failed to identify any medical expert witnesses. Rather, Mills requested that the Court direct the University of Kentucky and University of Tennessee's Anesthesiology Departments to provide him with the professional guidelines for stellate ganglion blockage procedures. Mills intends to introduce, through his own testimony, the various research studies as his proof of medical malpractice.

The U.S. has retained Dr. John B. Ward ("Ward"), an expert medical witness, who will testify that Mills was provided with the

appropriate medical care and treatment during the stellate ganglion block procedure and during all follow-up medical care. Pursuant to the Court's scheduling order, the U.S. furnished Mills with Ward's report.

DISCUSSION

SUBSTANTIVE LAW

Liability for medical malpractice under the FTCA is determined by reference to the substantive law of the state in which the alleged negligent act or acts occurred. Rayonier, Inc. v. United States, 352 U.S. 315 (1957). Mills, in his administrative complaint and in the FTCA complaint filed in this Court, alleges that the employees and agents of the VA Medical Center in Indianapolis, Indiana acted negligently. Additionally, in the Rule 26 meeting, Mills attempted to allege that the employees and agents of the VA Medical Centers in Lexington, Kentucky and Johnson City, Tennessee acted negligently. In short, a resolution of this case requires review of Indiana, Kentucky and Tennessee medical malpractice law.

A. Indiana Law

Under Indiana law, expert witness testimony is required to establish a *prima facie* case of medical malpractice. The expert testimony is necessary to establish the requisite standard of care, whether there is a breach of the standard, and whether the breach is the negligence which resulted in the alleged injury. Revord v. Russell, 401 N.E.2d 763 (1980).

B. Kentucky Law

Expert testimony is required to establish each element of the plaintiff's burden of proof on medical issues. Jarboe v. Harting, 397 S.W.2d 775 (Ky. App. 1965).

C. Tennessee Law

In medical malpractice actions under Tennessee law, the plaintiff has the burden of proving, by expert testimony, (1) the standard of care, (2) that defendant deviated from that standard, and (3) that as a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred. Hurst by Hurst v. Dougherty, 800 S.W.2d 183 (Tenn. App. 1990). Negligence and causation in medical malpractice cases are ordinarily required to be proved by expert medical testimony. Murphy v. Schwartz, 739 S.W.2d 777 (Tenn. App. 1986).

ANALYSIS

The U.S.'s position is that Mills has no expert medical proof to discharge his burden of proof. Additionally, the U.S. notes that Mills has no expert witness to counter the conclusions of Dr. Ward, the U.S. expert witness who opines that Mills received treatment well within the appropriate standard of care.

Indiana, Kentucky and Tennessee have clear requirements that a medical malpractice claim be proven by expert testimony. Mills' attempts to comply with this requirement falls short of what the Court can accept as expert testimony. Mill requests that the following items of "proof" be accepted by the Court as expert testimony: 1) information from the University of Kentucky and the University of Tennessee as to the professional guidelines for stellate ganglion blockage procedures; 2) a research study done by the Department of Health and Human Services on reflex sympathetic

dystrophy (RSD) to show that Mills was not treated properly; and 3) records of his current treating physician to show that Mills was treated improperly.

To his response to the U.S.'s motion for summary judgment, Mills attaches articles and reports to show that he is the victim of medical malpractice. Again, he requests that the Court treat these materials as "expert testimony". These materials (i.e. unauthenticated reports and a newspaper article) are inadmissible hearsay evidence. While *pro se* litigants receive wide latitude in the judicial process, the Court cannot accept evidence which is clearly unacceptable so as to support a claim of medical malpractice. Dismissal of the plaintiff's claim, however, is too harsh a sanction, in light of his *pro se* status. The Court will permit the plaintiff additional time to secure properly admissible expert witness testimony. If that testimony, once obtained, is inadequate to support the plaintiff's claim, it will be dismissed.

Additionally, the Court lacks jurisdiction over Mills' claims not presented to the administrative body prior to the initiation of this lawsuit. Section 2675(a) of Title 28 of the United States Code provides in pertinent part:

> An action shall not be instituted upon a claim against the Untied States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful omission of any employee of the Government while acting within the scope of his office or employment, **unless the claimant shall have first presented the claim to the appropriate Federal agency** in writing . . . .

(Emphasis added). It is clear that the only claim presented to the Department of Veterans Affairs was the alleged medical malpractice

of Carroll of the VA Medical Center in Indianapolis. This claim was presented and denied. Mills' claims against the employees and agents of the VA Medical Centers in Tennessee and Kentucky were not presented to the Department of Veterans Affairs. Therefore, Mills is precluded from presenting those claims in this forum.

Accordingly, IT IS ORDERED that the defendant's motion to dismiss or, in the alternative, for summary judgment, is GRANTED as to Mills' claims against the employees and agents of the VA Medical Centers in Tennessee and Kentucky.

IT IS FURTHER ORDERED that the defendant's motion to dismiss or, in the alternative, for summary judgment is DENIED as to the plaintiff's claims which arose from his treatment at the VA Medical Center in Indiana. The plaintiff shall serve an amended expert witness report, pursuant to Fed. R. Civ. P. 26(a)(2), within sixty (60) days from the date of this order. Those written reports, signed by the potential expert witness, shall include, unless waived by the United States, the following data: 1) a complete statement of all opinions to be expressed and the basis and reasons therefor; 2) the data or other information considered by the witness in forming the opinions; 3) any exhibits to be used as a summary of or support for the opinions; 4) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; 5) the compensation to be paid for the study and testimony; and 6) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

IT IS FURTHER ORDERED that the parties shall file an amended joint status report within thirty (30) days from the date of this order, in a format comparable with that of Fed. R. Civ. P. Form 35, as discovery has been stayed pending the resolution of this motion.

IT IS FURTHER ORDERED that the pretrial conference scheduled for March 14, 1996 and the court trial scheduled for April 29, 1996 are canceled.

This the 4th day of March, 1996.

/s/ Jennifer B. Coffman
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF KENTUCKY

App. 17 (E)

DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

May 25, 1994

CERTIFIED MAIL

In Reply Refer To:
021:REB

Mr. Vernon Mills
P.O. Box 472
Heidrick, Kentucky 40949

Subject: Administrative Tort Claim
Request for Review of Prior Denial

Dear Mr. Mills:

On May 13, 1994, we received your written request, dated May 9, 1994, to review your administrative tort claim which was previously denied by the Indianapolis District Counsel on November 12, 1993.

A request for reconsideration must be received within 6 months from the date of denial. Since your letter was received more than 6 months after the date of denial, your request was not timely filed as required by section 14.9(b), title 28, Code of Federal Regulations. There is, therefore, no authority for reconsideration of your claim by the VA.

We refer you to the District Counsel's letter, wherein he advised you of the provisions of the Federal Tort Claims Act (sections 1346(b) and 2675, title 28, United States Code) which provide, in effect, that a tort claim which is administratively denied may be presented to a

Federal district court for judicial consideration. Such suit must have been initiated, however, within 6 months after the date of mailing of the District Counsel's letter of final denial (section 2401, title 28 United States Code)

Sincerely yours,

/s/ James P. Kane
James P. Kane
Assistant General Counsel

App. 19 (E)

DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

JUL 20, 1994

In Reply Refer To:
021:REB

Mr. Vernon Mills
P.O. Box 472
Heidrick, Kentucky 40949

Subject: Administrative Tort Claim
Request for Review of Prior Denial

Dear Mr. Mills:

Thank you for your letter of June 1, 1994, indicating your interpretation of what constitutes the date of mailing for purposes of the Federal Tort Claims Act (FTCA) in sections 1346 (b) and 2671 through 2680, Title 28, United States Code.

You state that the date of mailing should be considered as the date of your receipt and not the date the letter was mailed to you. The terms of the FTCA are clear. Section 2675(a) of title 28, United States Code, mandates that denial of a claim be in writing and sent by certified or registered mail. The time for commencing an action against the Government, after denial of the claim, is "within six months after the date of mailing." See section 2401(b) of title 28, United States Code. Courts have found that the 6-month period for filing suit runs from the day after mailing until the same date 6 months later, not including Saturdays, Sundays, and holidays; *Vernell v. USPS*, 819 F.2d 108 (5th Cir. 1987). Your denial letter was

mailed on November 12, 1993, and you had 6 months, or until May 12, 1994, to file suit or request reconsideration.

A request for reconsideration must be "received" within 6 months. Your mailing of the request does not toll the period. A claim is not filed with an agency by the mere "act of depositing an envelope in a mailbox." This is not "equivalent to receipt by a federal agency, much less 'presentment' within the meaning of the controlling statutes." *Steele v. United States*, 390 F. Supp. 1109, 1111 (S.D. Cal. 1975).

In view of the above, we cannot alter our position as noted in our May 25, 1994, letter to you.

Sincerely yours,

/s/ James P. Kane
James P. Kane
Assistant General Counsel

App. 21 (F)

DEPARTMENT OF VETERANS AFFAIRS
Office of District Counsel
575 North Pennsylvania Street
Indianapolis, IN 46204

Certified Mail
P 977 725 136

November 12, 1993

In Reply Refer To: 326/02
SSN 403-74-1090
DC 10002

Vernon Mills
P.O. Box 472
Heidrick, KY 40949

Dear Mr. Mills:

This letter is in reference to the administrative tort claim you filed with the Department of Veterans Affairs on behalf of yourself for money damages for personal injury including loss of use of your left arm and neck aches and burns and constant pain in your left shoulder and upper back allegedly caused by improper and incorrect injection of medication into your neck for a nerve block performed on July 3, 1991, at the Richard L. Roudebush Veterans Affairs Medical Center, Indianapolis, Indiana. The claim is dated May 18, 1993 and was received in this office on May 19, 1993.

This office has been investigating the facts and circumstances pertaining to the medical care provided to you at the Richard L. Roudebush Veterans Affairs Medical Center, Indianapolis. Our review does not reveal the existence of any negligent or wrongful act or omission of any employee of the United States Government acting within the scope of his or her office of employment causing injury to you. Accordingly, your claim is hereby respectfully denied.

If you are dissatisfied with the decision of this office on your administrative claim, you may, prior to the expiration of six months from the date of mailing of this notice of final denial, file a request with the Department of Veterans Affairs for reconsideration of the claim. This request should be addressed to the Department of Veterans Affairs, General Counsel (021B), 810 Vermont Avenue, N.W., Washington, DC 20420. Upon filing such request, the Department of Veterans Affairs shall have six months from the date of that filing in which to make final disposition of the claim, and your option to file suit in an appropriate U.S. District Court under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of such request for reconsideration (28 C.F.R. 14.9).

In the alternative, your attention is invited to the provisions of the Federal Tort Claims Act (28 U.S.C. 1346(b) and 2675), which provide that a tort claim which is administratively denied may be presented to a U.S. district court for judicial consideration. Such suit must be initiated within 6 months after the mailing of this notice of final denial (28 U.S.C. 2401). If you decide to initiate a suit against the Department of Veterans Affairs, you are advised that the proper party defendant is the United States of America (28 U.S.C. 1346(b) and 2671, et seq.).

Sincerely yours,

/s/ WILSON L. TOW
WILSON L. TOW
District Counsel